

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SAMISONI TAUKITOKU,

Case No. 3:16-cv-00762-HDM-CSD

Petitioner,

V.

ORDER

WARDEN FILSON, et al.,

Respondents.

10 This habeas matter is before the Court on Respondents' Motion
11 for Partial Reconsideration, or in the Alternative, Motion for
12 Clarification (ECF No. 64). Petitioner Samisoni Taukitoku filed
13 his Opposition (ECF No. 65). Also before the Court is Respondents'
14 Motion to Suspend Briefing (ECF No. 66), Petitioner's Opposition
15 (ECF No. 67), and Respondents' Reply (ECF No. 68).

Background

17 The Court granted Taukitoku's first motion for discovery and
18 instructed the Washoe County District Attorney's Office to provide
19 all materials previously disclosed to defense before and during
20 Taukitoku's trial. (ECF No. 25.) After receiving the materials
21 provided as a result of the order granting discovery, counsel
22 conducted its own investigation for the instant habeas case.
23 Counsel located and obtained declarations from several
24 eyewitnesses who claim they saw persons other than Taukitoku fire
25 shots during the fights. (Exs. 5-10; ECF No. 33.)

26 Taukitoku filed a third motion for discovery seeking the
27 release of the State's ballistics expert, Kevin Lattyak's
28 ("Lattyak") bench notes and photographs, on which he based his

1 report, as well as physical evidence, for review by an independent
2 expert. (ECF No. 32.) The Court denied his motion without prejudice
3 finding that Taukitoku should first pursue his unexhausted claims
4 and their related discovery in state court. (ECF No. 41.) The Court
5 then granted Taukitoku's motion for stay and abeyance pending
6 exhaustion of his unexhausted claims. (ECF No. 44.) The state court
7 dismissed his state habeas petition finding his claims
8 procedurally barred.¹ (Ex. 44; ECF No. 47-22.) Taukitoku appealed
9 and the Nevada Supreme Court affirmed. (Ex. 49; ECF No. 47-26.)

10 The Court granted Taukitoku's motion to reopen and Taukitoku
11 filed his second amended petition. (ECF Nos. 49, 50.) Taukitoku
12 filed a fourth motion for discovery again seeking the release of
13 Lattyak's bench notes and photographs as well as release of
14 physical evidence, including 2 firearms, 10 projectiles, 16
15 casings, and 1 fragment recovered for examination at Forensic
16 Analytical Crime Lab. (ECF No. 51.) The Court granted Taukitoku's
17 motion for discovery. (ECF No. 62.) The Court, however, based on
18 Respondents' concerns regarding potential jeopardization of chain
19 of custody for physical materials, instructed the parties to meet
20 and confer and prepare for the Court a proposed order permitting
21 discovery that will assure that a proper chain of custody will be
22 maintained, and that the integrity of the evidence will be
23 maintained and that sufficient safeguards shall be in place to
24 eliminate any possibility of tampering with or alteration or
25 destruction of the release of physical evidence. (*Id.* at 9.)

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27 ¹ Taukitoku's requests for an evidentiary hearing in state court
28 were denied. (ECF No. 51 at 11.)

Discussion

I. Motion for Partial Reconsideration, or in the Alternative, Motion for Clarification

Respondents acknowledge that they are not challenging the Court's order granting discovery. (ECF No. 64 at 3.) Respondents, however, provide that the Washoe County District Attorney and the Washoe County Sheriff's department control the physical evidence at issue and that Respondents do not have a client relationship with such agencies; nor do they have independent authority regarding the production of evidence for such agencies. (*Id.*) Respondents further express concern that a potential meet and confer with Taukitoku may "[blur] the lines between independent agencies and [conflate] the role of the 'state' with that counsel for the Warden." (*Id.* at 4.) Respondents assert that Rule 45 of the Federal Rules of Civil Procedure allows a third-party to object to a subpoena and that they have to be given an opportunity to reach an agreement about the method of transferring property. (*Id.*) Respondents request the Court to alter or amend its order to allow "the third parties having control of the evidence to work with Petitioner's counsel in drafting the necessary orders to allow the release of the evidence for testing by Petitioner's expert." (*Id.* at 4.)

In response, Taukitoku asserts that counsel has gathered further information regarding the physical evidence at issue and the chain of custody protocol of the independent examiner. (ECF No. 65 at 2-3.) The physical evidence has been released to the Reno Police Department ("RPD"). The independent examiner, Forensic Analytical Crime Lab, has established chain of custody protocols

1 and, in addition, the physical evidence can be shipped directly to
2 the independent examiner with a tracking number serving to maintain
3 chain of custody. (*Id.*) Upon confirmation of control of the
4 physical evidence, the Evidence Supervisor at the RPD agreed that
5 the physical evidence can be shipped to the independent examiner
6 and "expressed no other concerns about maintaining chain of
7 custody." (*Id.* at 3.) Taukitoku requests that the Court order or
8 authorize a subpoena for the Reno Police Department to release the
9 2 firearms, 10 projectiles, 16 casings, and 1 fragment recovered
10 in connect with this case for examination at Forensic Analytical
11 Crime Lab. (*Id.* at 4.)

12 The Court agrees with Taukitoku's assertion that it is not
13 necessary for him at this juncture to further address chain of
14 custody with "third parties." (*Id.* at 3.) Entities that are served
15 with subpoenas may raise objections to such subpoenas and Taukitoku
16 represents that he does not anticipate objections from the RPD at
17 this time. (*Id.*) Accordingly, the Court denies Respondents' motion
18 for partial reconsideration to the extent that they request
19 Taukitoku work further with third parties having control of the
20 evidence in drafting a subpoena to release the physical evidence.
21 Taukitoku may proceed with issuing a subpoena for the Reno Police
22 Department to release the 2 firearms, 10 projectiles, 16 casings,
23 and 1 fragment recovered in connection with this case for
24 examination at Forensic Analytical Crime Lab upon the
25 representation that the evidence will be sent directly to the lab
26 via certified mail, FedEx, or UPS with all standard chain of
27 custody protocols to be followed.

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1 **II. Motion to Suspend Briefing**

2 Respondents request that the Court suspend briefing until the
3 completion of discovery. (ECF No. 66.) They assert that the
4 availability of procedural defenses and their merits analysis may
5 change depending on the outcome of discovery. (*Id.* at 2.) Taukitoku
6 argues that discovery results would only further support his claims
7 and cause and prejudice argument to overcome anticipated
8 procedural defenses. (ECF No. 67 at 4.) He asserts that a
9 suspension of briefing would cause unnecessary delay and
10 anticipates that retesting and analysis of the physical evidence
11 to take approximately one month. (*Id.* at 3-4.) Taukitoku, however,
12 has no objection to an extension of time to file a response to his
13 second amended petition. (*Id.* at 5.)

14 In their reply, Respondents, in the alternative, request a
15 90-day extension of time to file a response to Taukitoku's second
16 amended petition. (ECF No. 68 at 1.) Respondents assert that any
17 procedural default defense will likely be met with a cause and
18 prejudice argument, including the application of *Martinez v. Ryan*,
19 566 U.S. 1 (2012), requiring a merits analysis of the claims that
20 Petitioner is developing through discovery. (*Id.* at 2.)

21 The Court denies Respondents' request to suspend briefing.
22 The Court, however, finds good cause to grant Respondents' request
23 to extend time to file their response to the second amended
24 petition. Respondents have until September 23, 2022, to file their
25 response to Taukitoku's second amended petition.

26 **IT IS THEREFORE ORDERED:**

- 27 1. Respondents' Motion for Partial Reconsideration, or in the
28 Alternative, Motion for Clarification (ECF No. 64) is

1 DENIED to the extent that they request Taukitoku to work
2 further with third parties having control of the evidence
3 in drafting a subpoena to release the physical evidence.

4 2. Taukitoku may proceed with issuing a subpoena to the Reno
5 Police Department to release the 2 firearms, 10
6 projectiles, 16 casings, and 1 fragment recovered in
7 connection with this case for examination at Forensic
8 Analytical Crime Lab upon the representation that the
9 evidence will be sent directly to the lab via certified
10 mail, FedEx, or UPS with all standard chain of custody
11 protocols to be followed.

12 3. Respondents' Motion to Suspend Briefing (ECF No. 66) is
13 DENIED. Respondents' request to extend, in the alternative,
14 is GRANTED. Respondents have until September 23, 2022, to
15 file their response to Taukitoku's second amended petition.

16 DATED: this 6th day of July, 2022.

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19 HOWARD D. MCKIBBEN
20 UNITED STATES DISTRICT JUDGE
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